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No. ~~81~~ 976

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

HARRY DONOVAN LOWE, Petitioner,

v.

OHIO STATE BAR ASSOCIATION, Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR WRIT OF CERTIORARI

Counsel of Record for Petitioner:

Stanley E. Preiser
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QUESTIONS PRESENTED

The Ohio State Bar Association initiated attorney disciplinary proceedings against the petitioner in the state of Ohio. The petitioner was subsequently publicly reprimanded and indefinitely suspended from the practice of law by the Supreme Court of Ohio. The questions thereby arising are:

1. Whether the Complaint filed against the petitioner by the Ohio State Bar Association failed to give the petitioner fair notice of the charges by not informing him of the precise nature of the charges against him as required by the Due Process Clause of the Fifth and Fourteenth Amendments.

2. Whether the decision to publicly reprimand and indefinitely suspend the petitioner from the practice of law was arbitrary in that there was insufficient evidence to rationally support the decision, all in violation of the substantive due process requirements of the Fifth and Fourteenth Amendments.

3. Whether the petitioner was given a full, fair, and meaningful hearing on the merits and was given an adequate written statement of the reasons for the decision and the evidence relied on in making the decision as required by the Due Process Clause of the Fifth and Fourteenth Amendments.

4. Whether the particular Disciplinary Rules the petitioner was found to have violated are so vague as to not provide fair warning of what conduct is prohibited and so vague as to be susceptible to arbitrary and subjective application, all in violation of the due process requirements of the Fifth and Fourteenth Amendments.

5. Whether the punishment accorded the petitioner was grossly disproportionate to the offense he was found to have committed, in contravention of the Eighth Amendment ban on cruel and unusual punishment.

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IN THE SUPREME COURT
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HARRY DONOVAN LOWE,

Petitioner,

v.

OHIO STATE BAR ASSOCIATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States. Harry Donovan Lowe, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in this case on July 22, 1981.

OPINION BELOW

The opinion of the decision rendered in the Supreme Court of Ohio to which this Petition for Writ of Certiorari is sought is reported as **Ohio State Bar Association v. Lowe**, 67 Ohio St. 2d 335, 423 N.E.2d 867 (1981), and appears in the Appendix at p. 67.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1970). The judgment sought to be reviewed by writ of certiorari was rendered by the Supreme Court of Ohio, the highest Court of the State of Ohio, on July 22, 1981, and was entered on July 22,

1981. An order denying a request for a rehearing was entered by the Supreme Court of Ohio on August 26, 1981.

CONSTITUTIONAL PROVISIONS INVOLVED

The petitioner is claiming rights under, and this petition involves, the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States as set out below:

Amendment V

No Person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, nor shall private property be taken for public use, without just compensation. UNITED STATES CONSTITUTION Amend. V.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. UNITED STATES CONSTITUTION Amend. VIII.

Amendment XIV, Section 1

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall invoke or enforce any law which shall abridge

the privileges or immunites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws. UNITED STATES CONTITUTION Amend. XIV, §1.

STATEMENT OF THE CASE

This petition for writ of certiorari arises out of attorney disciplinary proceedings in the State of Ohio. The petitioner, Harry Donovan Lowe, was a licensed and praticing attorney in Ohio. On October 19, 1978, the Ohio State Bar Association filed a complaint against the petitioner setting forth twelve counts of alleged violations of the Code of Professional Responsibility. (p. 17)[1] A timely answer was filed by the petitioner which consisted primarily of a general denial of the allegations.

Petitioner has contended throughout the proceedings that the complaint filed against him did not set out with sufficient specificity the charges against him and the particular conduct constituting those charges. As a result, the petitioner did not have adequate notice of the charges against him and was thus not able to properly defend himself against the charges. The petitioner relies upon this denial of due process as one of his grounds for seeking this writ of certiorari. A more detailed explanation of the manner in which the petitioner raised this question in the proceedings will be provided in proper chronological sequence within this Statement of the Case, with appropriate references.

On June 29, 1979, a pre-trial hearing was held before a three member panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. Later a stipulation of documents and

[1]References are to pages of this petition.

facts was entered into by the parties and made a part of the record.

A private hearing on the charges before the Board of Commissioners on Grievances and Discipline was commenced on April 14, 1980. Both parties were allowed to call witnesses and present evidence in support of their case. After four days of testimony the hearing was recessed until June 16, 1980, at which time two additional days of testimony were taken. The testimony over this period of time consisted of seven volumes of transcript with numerous exhibits offered by both parties. At the conclusion of the taking of testimony, the Board dismissed Counts I and III of the Complaint. In lieu of oral argument both parties filed initial briefs and the petitioner filed a reply brief to the respondent's initial brief.

Petitioner's reply brief (p. 32) raised the question of the sufficiency of the Complaint. Petitioner argued that there was no specificity to the charges; therefore, the Complaint and subsequent hearing did not comport with the due process requirements of the Constitution of the United States. Based upon this argument and others the petitioner prayed for dismissal of the charges.

On January 16, 1981, the Board of Commissioners on Grievances and Discipline filed with the Supreme Court of Ohio its "Findings of Fact and Recommendation." (p. 35). In this report the Board dismissed Counts II, VI, X and XI of the Complaint. The Board did, however, find violations of the disciplinary rules as alleged in Counts IV, V, and XII of the Complaint and recommended a public reprimand for those violations. In addition the Board found violations of the disciplinary rules as alleged in Counts VII, VIII, and IX and recommended indefinite suspension from the practice of law for those violations. The Board, by finding the petitioner guilty of six counts of the Complaint, in effect denied petitioner's prayer for dismissal based on the

due process arguments raised in his reply brief.

Upon receiving the Board's Findings of Fact and Recommendation, the Supreme Court of Ohio issued an Order to Show Cause as to why the recommendations of the Board should not be adopted. On March 2, 1981, the petitioner filed his Objections to the Findings and Recommendation of the Board of Commissioners on Grievances and Discipline (p. 53), along with his Brief in Support of his Objections (p. 56), with the Supreme Court of Ohio. In Paragraph 2. of the petitioner's Objections (p. 53) and in Proposition of Law No. 2 of the petitioner's Brief in Support of his Objections (p. 56) the petitioner raised the question of whether DR 1-102(A)(6), which prohibits "any other conduct that adversely reflects on his fitness to practice law," is void for vagueness. The petitioner argued that the rule was so vague and indefinite as to not adequately and fully inform potential offenders of the conduct prescribed, thus denying him due process of law.

The respondent filed an Answer Brief on March 17, 1981. The petitioner then filed a Reply Brief (p. 59) on March 30, 1981. In his proposition of Law No. 2 (p. 59) of the Reply Brief, the petitioner again asserted his argument that DR 1-102(A)(6) was void for vagueness.

The matter was then brought on for oral argument before the Supreme Court of Ohio on May 27, 1981.

On July 22, 1981, the Supreme Court of Ohio issued an order indefinitely suspending the petitioner's license to practice law in the State of Ohio. (p. 61). The Court also issued a **per curiam** opinion on July 22, 1981, which summarily adopted the Findings and Recommendation of the Board of Commissioners on Grievances and Discipline and ordered that the petitioner be indefinitely suspended from the practice of law. (p. 67). These rulings in effect denied petitioner's prayer for dismissal based on his argument that DR 1-102(A)(6) was void for vagueness.

The petitioner then filed with the Supreme Court of Ohio a timely Motion for Rehearing on August 3, 1981. (p. 70). As grounds for his Motion for Rehearing, the petitioner asserted that the Supreme Court of Ohio had simply, without an adequate independent examination of the facts and charges, adopted the findings and conclusions of the Board of Commissioners on Grievances and Discipline, thus dening petitioner both substantive and procedural due process of law. As an additional ground, the petitioner asserted that the particular rules of the Code of Professional Responsibility of which he was found to have violated were void for vagueness. Finally, the petitioner asserted that the punishment he received, denial of his right to practice law, was too harsh for the violation he was found to have committed, in violation of the Eighth Amendment of the Constitution of the United States.

The Supreme Court of Ohio summarily denied the petitioner's Motion for Rehearing by Order dated August 26, 1981. (p. 75).

The petitioner now brings this Petition for Writ of Certiorari to the Supreme Court of Ohio.

REASONS FOR GRANTING THE WRIT

1. The decision by the Supreme Court of Ohio is in direct conflict with the due process principles enunciated in this Court's *Ruffalo* ruling.

In **In the Matter of John Ruffalo, Jr.**, 390 U.S. 544 (1968), this Court held that disbarment proceedings are adversary proceedings of a quasi-criminal nature that can lead to punishment of a lawyer. As a result, a lawyer is "...entitled to procedural due process, which includes fair notice of the charge." 390 U.S. at 550. An attorney must be informed of the precise nature of the charges against him at the very outset of the proceedings so that he can adequately prepare to meet the charges and present his defense. These principles are echoed by the Court of Appeals for the Third Circuit in **Committee on Professional Ethics and Grievances of the Virgin Islands Bar Association v. Johnson**, 447 F.2d 169 (3rd Cir. 1971).

The Complaint filed against the petitioner in this case by the Ohio State Bar Association fails to meet the procedural due process requirement of fair notice as set out in **Ruffalo**. A cursory reading of each count of the Complaint (p. 17) shows that the allegations are nothing more than a general recitation of a set of facts followed by a conclusory statement that the petitioner has violated some specified rule of the Code of Professional Responsibility. In not one of the Counts does the Complaint allege the necessary elements of the particular Disciplinary Rule cited or the particular conduct of the petitioner that supposedly contitutes each element. Thus it was impossible for the petitioner to determine with any degree of certainty exactly what conduct the Bar would be attempting to prove to establish each element of each alleged violation. As a result the petitioner was not able to adequately prepare his defense to meet the charges. Due to the lack of specificity of the charges, the hearing

before the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio amounted to nothing more than the Bar Association introducing an overwhelmingly voluminous amount of evidence bearing on endless facets of the petitioner's business and professional life with the hope that out of this mountain of evidence the Board could find support for the charges of misconduct alleged. The record of this hearing will evidence the futility with which the petitioner attempted to defend himself against this scattergun approach used by the Bar to prove its charges.

Consequently, the Board did find that the petitioner was guilty on six of the twelve counts alleged in the Complaint (p. 35) over the petitioner's objections, which included an objection based on the lack of specificity of the charges. The Supreme Court of Ohio subsequently adopted the findings of the Board (p. 67). The Supreme Court of Ohio's decision in this matter is therefore in direct conflict with this Court's holding in **Ruffalo.**

The Ohio Supreme Court's summary treatment of this question implies that future deprivations of due process such as the one here will go uncorrected unless this Court exercises its discretion to remedy the situation. Therefore, it is essential that this Court hear and rule on the important Constitutional question presented in this petition.

2. **The decision by the Supreme Court of Ohio is in direct conflict with the substantive due process principles established in this Court's *Konigsberg* and *Schware* rulings.**

In the companion cases of **Schware v. Board of Bar Examiners of the State of New Mexico,** 353 U.S. 232 (1957), and **Konigsberg v. State Bar of California,** 353 U.S. 252 (1957), this Court held that a state's action to exclude a person from the practice of law must meet the substantive due process requirements of the Fourteenth Amendment. These requirements are that the

decision to exclude one from the practice of law must not be arbitrary or discriminatory. More particularly, due process requires that there be sufficient evidence in the record to rationally support the grounds upon which the state denies a person the right to practice law. 353 U.S. at 262 and 353 U.S. at 239. While these two cases dealt specifically with a person being denied admission to the Bar, the due process principles enunciated in the decisions would apply with equal force to the situation where a lawyer is facing disbarment. In the latter case, it is even more important that due process be comported with since a person is being deprived of a right that has already been granted to him.

An examination of the record of the hearing held before the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio and its Findings of Fact and Recommendation (p. 35) clearly shows that there is no evidence which rationally supports the finding that the petitioner violated the Disciplinary Rules he was found to have violated. As was argued earlier, the record shows that the Bar introduced evidence that painted a broad and sweeping picture of the petitioner's professional dealings. The picture thus painted obviously created general suspicion of impropriety in the minds of the Board members, such that they arbitrarily found that the petitioner was guilty of six of the originial twelve counts of misconduct filed against him. Nowhere in the record, however, is there sufficient evidence to support a rational finding of guilt on any one of those six counts considered individually. This is a clear denial of substantive due process of law.

By adopting and ratifying the Board's Findings of Fact and Recommendation, the Supreme Court of Ohio has deprived the petitioner of due process in contravention of the principles laid down in this Court's **Schware** and **Koningsberg** decisions. This Court should therefore exercise its discretionary power to grant this writ of certiorari to consider this important constitutional question.

3. The decision by the Supreme Court of Ohio does not comport with various rulings of this Court and of two United States Courts of Appeals dealing with the sufficiency of the hearing and the findings of fact and law required by due process.

The Court has said, in **Wolff v. McDonnell**, 418 U.S. 539 (1974) and **Goldberg v. Kelly**, 397 U.S. 254 (1970), that since due process requires that a decision be rationally based on the evidence adduced at the hearing, it is necessary to demonstrate compliance with this requirement for the decision maker to render a written statement of the reasons for his determination and the evidence he relied on. Otherwise, there would not be an adequate record on which the decision could be challenged on review by a higher body. The United States Court of Appeals for the Seventh Circuit has applied these principles to attorney disciplinary proceedings. **In Re Oliver**, 470 F.2d 15 (7th Cir. 1972). There the Court said there must be express findings on each element of the violations charged. "Disbarment of an attorney...is a serious penalty and should not be imposed except upon express factual findings of the elements necessary to support the charges of violation of the Rules...." 470 F.2d at 17. It cannot from a bare conclusion of violation be implied that the decision maker found evidence to support each element of the violation.

An examination of the Findings of Fact and Recommendation made by the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio (p. 35) reveals that this statement of findings does not satisfy the requirements as set out above. These findings do nothing more that recite a brief summary of facts followed by a conclusory declaration that the petitioner violated some cited Disciplinary Rule. There was no attempt made whatever to specify what conduct and how that conduct constituted a violation of the particular Rule cited, much less to set forth each element of the violation and specify what conduct was proved to

establish each element. This left the petitioner at a complete loss as to how to argue against the findings upon review by the Supreme Court of Ohio. It is impossible to argue that the Bar has not met its burden of proof on a particular element of a violation, when it is not even known on what evidence the Board relied to conclude that that element was established. Essentially, there was not a sufficient record of the findings of the Board to allow the petitioner to effectively and adequately argue the decision to the Supreme Court of Ohio. Therefore, the petitioner was denied due process of law, and the Ohio Court's ruling is in direct conflict with the holdings of this Court and of the Court of Appeals for the Seventh Circuit.

Futhermore, this Court has said that the opportunity to be heard is a fundamental requirement of due process which "...must be granted at a meaningful time and in a meaningful manner." **Armstrong v. Manzo**, 380 U.S. 545, 552 (1965). The hearing granted must be one in which the merits of the cause have been fairly and fully presented to the deciding body. See **In Re Noell**, 93 F.2d 5 (8th Cir. 1937).

In the case at bar, the Supreme Court of Ohio has sole and originial jurisdiction to impose disciplinary sanctions against an attorney. Thus it is incumbent upon that Court to fully and fairly review the findings of the Board of Commissioners on Grievances and Discipline before reaching a decision in a particular case. Otherwise, the hearing and opportunity for review that is granted to the attorney becomes nothing more than a procedural formality. This is not the type of meaningful hearing that due process comtemplates.

It is apparent from a reading of the Ohio Supreme Court's opinion in the instant case (p. 67) that the Court merely, without any independent review or weighing of the evidence, adopted the findings and conclusions of the Board of Commissioners in a summary fashion. As a result the petitioner was denied a mean-

ingful opportunity to be heard before the Supreme Court of Ohio, the only body in Ohio with authority to discipline him. This is a clear denial of due process as defined by this Court. Therefore, this Court should grant petitioner's request for writ of certiorari to review the important question of constitutional law involved here.

4. The decision by the Supreme Court of Ohio directly conflicts with the due process principles enunciated in this Court's *Grayned* ruling.

This Court has long held that statutory prohibitions must be drawn with a certain degree of specificity to comply with due process principles.

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vauge law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basic, with the attendent dangers of arbitrary and discriminatory application. **Grayned v. City of Rockford,** 408 U.S. 104, 108 (1972).

As discussed earlier, the petitioner was found to have violated the Code of Professional Responsibility

in six of the twelve counts that were alleged. (p. 35) In four of those six counts, the petitioner was found to have violated DR 1-102(A)(6) of the Code of Professional Responsibility which provides that "[a] lawyer shall not [e]ngage in any other conduct that adversely reflects on his fitness to practice law." In all three of the counts on which the Court based its decision to indefinitely suspend the petitioner's license to practice law, the petitioner was found to have violated DR 1-102(A)(6). It is apparent from the record and the Findings of Fact and Recommendation of the Board of Commissioners that there was insufficient evidence to find that the petitioner had violated any other more specific Disciplinary Rule. The Board of Commissioners, on a subjective and arbitrary basis, found that certain of the petitioner's conduct amounted to conduct that adversely reflected on his fitness to practice law. Based on this arbitrary finding, the petitioner has been stripped of his license to practice law.

This is precisely the type of situation the holding in **Grayned** was attempting to prevent. As applied to the petitioner, DR 1-102(A)(6) was so vague that it did not fairly warn him of exactly what conduct was permissable and what was not. In such a situation, the lawyer is forced to gamble on whether his conduct will be found to adversely reflect on his fitness to practice law after the fact. In addition, DR 1-102(A)(6) offers no guidelines to those who enforce the rule. The disciplinary body is free to determine if a lawyer's conduct adversely reflects on his fitness to practice law on an ad hoc and subjective basis. This is the situation found in the instant case. The Board of Commissioners made a subjective determination that the petitioner's conduct amounted to conduct that adversely reflected on is fitness to practice law. There were no standards by which either the peititioner or the Board could draw the line between what was permissable and what was forbidden.

The United States Court of Appeals for the Fourth Circuit has held that similarly broad language found in DR 7-107(D) is unconstitutionally vague. **Hirschkop v. Snead**, 594 F.2d 356 (4th Cir. 1979). That rule provides that a lawyer in a criminal trial may not make any statement about "...other matters that are reasonably likely to interfere with a fair trial." The Court of Appeals found that this language ran afoul of the principles laid down in **Grayned.** The language found in DR 1-102(A)(6) is far more nebulous and uncertain than that found in DR 7-107(A). There is no question, therefore that this Court of Appeals would find that DR 1-102(A)(6) is void for vagueness based on the **Grayned** decision.

It is clear that the Ohio Supreme Court's decision to disbar or reprimand the petitioner based on a violation of DR 1-102(A)(6) is in direct conflict with this Court's decision in **Grayned** and the decision of the Court of Appeals for the Fourth Circuit in **Hirschkop.** Since practically every state in the country has a Disciplinary Rule similar or identical to DR 1-102(A)(6), the question of whether this rule is unconstitutionally vague is of substantial importance and should be decided by this Court.

5. The decision by the Supreme Court of Ohio is in direct conflict with the Eight Amendment prohibition against cruel and unusual punishment as espoused in this Court's *Hutto* and *Estelle* decisions.

This Court has recognized that an enlightened view of the Eight Amendment ban on cruel and unusual punishment proscribes more than physically barbarous punishments. It prohibits penalties that are grossly disproportionate to the offense. **Hutto v. Finney**, 437 U.S. 678 (1978); **Estelle v. Gamble**, 429 U.S. 97 (1976).

As discussed previously, the petitioner was indefinitely suspended from the practice of law upon being found guilty of the misconduct alleged in three counts of the original Complaint. (p. 35). In each of

those three counts, the petitioner was found to have violated DR 1-102(A)(6) by having engaged in conduct that adversely reflected on his fitness to practice law. It being the petitioner's contention that there is no evidence to support a finding of violation of any other more specific disciplinary rule, it is obvious that the Board of Commissioners recommended disbarment based upon a finding of generalized misconduct that the Board subjectively determined reflected on the petitioner's fitness to practice law. This being the offense that the petitioner committed, a penalty as harsh as disbarment is clearly not appropriate. Disbarment is the most severe penalty that can be exacted of an attorney. Imposing the most severe penalty possible on an attorney for such a generalized finding of misconduct is clearly grossly disproportionate. The most severe penalty sould be reserved for the cases involving the most severe misconduct. that is not the case here.

Due to the gross disproportionality of the penalty imposed on the petitioner, he has been cruelly and unusually punished as defined by this Court in **Hutto** and **Estelle**. This Court should thus grant this petition for writ of certiorari to remedy the unconstitutionally harsh punishment inflicted on the petitioner.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted. Respectfully submitted,

_____

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APPENDIX

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

(Filed October 16, 1978)

In re:
Complaint against

Harry Donovan Lowe a.k.a. Donovan Lowe *No. 312*
59 North Seventh Street
McConnelsville, Ohio 43756

RESPONDENT

Ohio State Bar Association
33 West Eleventh Avenue
Columbus, Ohio 43201

RELATOR

Now comes the Realtor and alleges that Harry Donovan Lowe a.k.a. Donovan Lowe, an Attorney at Law, duly admitted to the practice of law in this State of Ohio is guilty of the following misconduct:

Count 1

1. On May 4, 1977, in the Court of Common Pleas for Pickaway County, Ohio, in Case No. 77-CR-56, Respondent entered a plea of no contest to the criminal charge of unauthorized use of property, under Section 2913.04 [A] of the Ohio Revised Code, by permitting his secretary to use a stenotype machine without the consent of the owner, the Respondent having been the prosecuting attorney of Morgan County at the time, and the

stenotype machine being owned by the County of Morgan, and also entered a plea of no contest for failure to file a 1975 Inventory of all materials, machinery, tools, and other county supplies under his jurisdiction as prosecuting attorney as required by Section 305.18 of the Ohio Revised Code, and being contrary to Section 2921.44 [E] of the Ohio Revised Code. Respondent was found guilty by the Court of the crimes as charged, was sentenced to the Pickaway County Jail for thirty (30) days and fined two hundred dollars ($200.00) on the first count, and sentenced to the Pickaway County jail for ninety (90) days and fined seven hundred dollars ($700.00) on the second count, and execution of the sentences was suspended.

2. Respondent has violated Canon 1, and DR 1-101[A] [4]and[6] of the Code of Professional Responsibility.

COUNT II

1. On May 4, 1977, in the Court of Common Pleas for Pickaway County, Ohio, in Case No. 77-CR-58, Respondent entered a plea of no contest in the criminal charge of failure to report a crime, under Section 2921.22[A] of the Ohio Revised Code. Respondent was found guilty by the Court of the crime as charged, sentenced to the Pickaway County Jail for thirty (30) days and fined one hundred dollars ($100.00), and execution of the sentence was suspended.

2. Respondent has violated Canon 1, and DR 1-102[A] [3] [4]and[6] of the Code of Professional Responsibility.

COUNT III

1. In his capacity of prosecuting attorney of Morgan County, Ohio Respondent received pursuant to Ohio Revised Code 325.12 a Statutory Allowance Fund for the use of the pro secutor's office. Respondent did not set up a separate account with a bank for such funds and placed all funds received for the R.C. 325.12 account in his private attorney trustee account.

2. On or about August 21, 1973, Respondent received the sum of $1,728.33 for such statutory allowance fund and deposited the same in his private attorney trustee account.

3. During a period from August 21, 1973, to February 28, 1974, when no less than $966.33 of said statutory allowance funds should have been in said account, the account was overdrawn at the bank on twenty-nine separate occasions with a negative balance.

4. On or about March 1, 1974, Respondent received the sum of $3,050.00 for such statutory allowance fund and deposited the same in his private attorney trustee account.

5. During a period from March 1, 1974 to February 18, 1975, no less than $721.45 should have been in the account, the account was overdrawn at the bank on eighteen [18] separate occasions with a negative balance.

6. On or about February 28, 1975, Respondent received the sum of $3,050.00 for such statutory allowance and deposited the same in his private attorney trustee account.

7. Respondent's trustee account during a period from February 28, 1975, to February 18, 1976, when no less than $744.15 should have been in the account, the account was over-

drawn at the bank on seventeen [17] separate occasions with a negative balance.

8. Relator says Respondent misappropriated said funds in violation of DR 1-102[A][3][4][5]and[6] and DR 9-102[A][1][2] of the Code of Professional Responsibility.

COUNT IV

1. From prior to June 1, 1970, to and including September 17, 1974, Respondent was the Prosecuting Attorney for Morgan County, Ohio. During said period Respondent was also engaged in the private practice of law.

2. As Prosecuting Attorney, Respondent was the legal adviser for all other county officers and boards [Section 309.09, Ohio Revised Code] and had a duty to protect the claims, funds, and other property of the county and state against loss or diminishment or misapplication [Section 309.12, Ohio Revised Code].

3. In June, 1970, there existed in favor of the Department of Public Welfare, State of Ohio, a lien in the amount of $9,416.99 on a 49-acre farm in the estate of Blanche Norris, deceased (Case No. 1843, Court of Common Pleas, Probate Division, Morgan County, Ohio). Respondent was the attorney for the administrator of said estate. Said farm had an appraised value in said estate of $6,000.00.

4. Commencing in June, 1970, and culminating on September 17, 1974, Respondent engaged in a course of conduct for the personal benefit of his friend, James C. Davis (who was then the Director of Public Welfare for Morgan County), and contrary to the interests of Morgan County and the State of Ohio,

whereby said 49-acre farm by instruments prepared by the Respondent was conveyed, from said estate through a 'straw man', whose role as such was not disclosed to the Probate Court or the Department of Public Welfare, to the said James C. Davis, free and clear of said lien. Said lien was purportedly transferred to another property having a value of $4,700.00.

5. Relator says Respondent has violated Cannons 6, 15, 29 and 32 of the Cannons of Professional Ethics which were in effect until October 5, 1970, and DR 1-102(A)(3)(7)and(8) of the Code of Professional Responsibility.

COUNT V

1. On or about November 20, 1973, Respondent purchased a 1974 Plymouth Station Wagon for the sum of $5,200.00 and was issued a Certificate of Title therefor, and obtained a loan of $5,200.00 from the Malta National Bank at Malta, Ohio and signed a Security Agreement in favor of such bank imposing a lien against the automobile for the unpaid balance of the loan. The Certificate of Title to such motor vehicle was returned to Respondent without a lien having been noted thereon by the bank.

2. On or about December 6, 1973, Respondent applied for and was granted a $4,000.00 loan from the First National Bank of McConnelsville, Ohio which bank retained the Certificate of Title to the same motor vehicle but did not record its lien thereon until April 12, 1974.

3. On or about March 12, 1974, a duplicate Certificate of Title to the same automobile was obtained from the Clerk of Courts of Morgan County which Certificate was thereupon given to the Malta National Bank as security for the original loan described above in paragraph 1, and a lien in favor of Malta National Bank was recorded thereon on April 4, 1974.

4. Respondent did not inform the First National Bank of McConnelsville of the loan he obtained from the Malta National Bank, Malta Ohio nor of the Security Agreement he signed in favor of Malta National Bank.

5. Respondent has violated DR 1-102(A)(3)(4)and(6) of the Code of Professional Responsibility.

COUNT VI

1. The Respondent as the Secretary-Treasurer and legal counsel for the Morgan County Wood Chips, Inc. wrongfully obtained $7,459.25 from said corporation by writing checks on the corporation's checking account with the Malta National Bank of Malta, Ohio to himself as follows: #1063 dated July 19, 1974 in the amount of $2,573.00; #1087B dated September 10, 1974, in the amount of $2,527.25; and #1100 dated October 17, 1974 in the amount of $2,359.00.

2. Relator says Respondent converted the funds to his own use in violation of DR 1-102(A)(3)(4)and(6), and DR 9-102(B)(3) of the Code of Professional Responsibility.

COUNT VII

1. On or about July 3, 1974, Respondent was serving in the capacity of Secretury-Treasurer of a corportation known as Morgan County Wood Chips, Inc. In such capacity he directed his personal secretary, one Julia Kincy, to prepare and sign his name to a check in the sum of $4,000.00 payable to one Marjorie Osborne, such check was prepared and Respondent's name signed thereto by Julia Kincy, and such check was deposited in the First National Bank of McConnelsville, Ohio in the account of Mar-

jorie Osborne. Respondent entered on the books of Morgan County Wood Chips, Inc. that such $4,000.00 was for the purchase of 40 shares of First National Bank stock from Marjorie Osborne on behalf of Morgan County Wood Chips, Inc.; on November 15, 1975, said shares of stock transferred on the books of the First National Bank from the account of Marjorie Osborne to the account of Respondent's parents R.D. and Mildred Lowe 20 shares to each.

2. Respondent has violated DR 1-102(A)(1)(3)(4)and(6) of the Code of Professional Responsibility.

COUNT VIII

1. On or about January 6, 1975, Respondent was serving in the capacity of Secretary-Treasurer of a corporation know as Morgan County Wood Chips, Inc. In such capacity Respondent issued a bank counter check in the sum of $7,000.00 drawn on the account of Morgan County Wood Chips, Inc. to purchase seven (7) shares of Malta National Bank stock. Respondent did not obtain the seven (7) shares of Malta National Bank stock from Morgan County Wood Chips, Inc. Such seven (7) shares were transferred as follows: four (4) shares to Donovan Lowe, two (2) shares to Marjorie Osborne, and one (1) share to David B. Osborne.

2. Respondent converted funds of Morgan County Wood Chips, Inc. to his own use and to the use of others in violation of DR 1-102(A)(3)(4)and(6) of the Code of Professional Responsibility.

COUNT IX

1. On or about May 6, 1975, Respondent was serving in the capacity of Secretury-Treasurer of Morgan County Wood Chips, Inc. In such capacity Respondent received a Check No. 1330 on the account of Merrill, Lynch, Pierce, Fenner, and Smith in the amount of $3,500.00 payable to the order of Morgan County Wood Chips, Inc.

2. Respondent endorsed or caused to be endorsed the name of 'Morgan County Wood Chips, Inc., D. Lowe' to said check.

3. Such check was then deposited into the Donovan Lowe Trustree Account, 7th Street, McConnelsville, Ohio, at the Malta National Bank, thereby depriving the Morgan County Wood Chips, Inc. of said $3,500.00

4. Respondent then paid said $3,500.00 and other funds to himself by check in the amount of $3,800.00 drawn on the Donovan Lowe Trustee Account resulting in an overdraft in such account as of May 13, 1975.

5. Relator says Respondent converted said funds to his own use in violation of DR 1-102(A)(3)(4)(6) and DR 9-102(B)(1) and (3) of the Code of Professional Responsibility.

COUNT X

1. The Respondent had a checking account with the Malta National Bank of Malta, Ohio titled 'Donovan Lowe, Office, 7th Strret, McConnelsville, Ohio' and made or caused to be made deposits in and withdrawals from said account is such manner as

to cause four hundred and sixty-two (462) overdrafts in the period from February 10, 1969, through December 31, 1975.

2. Respondent has violated Cannons 29 and 32 of the Canons of Professional Ethics and Canon 9 and DR 1-102(A)(3)(4) and (6) of the Code of Professional Responsibility.

COUNT XI

1. On or about September 27, 1968, Respondent was appointed Guardian of one Glen B. Woodard, incompentent, Case No. 1681 of the Probate Court of Morgan County, Ohio, and Respondent filed his First and Final Account on September 12, 1977, and was discharged as the Guardian.

2. During the time that he was Guardian of one Glen B. Woodard, Respondent received funds in various amounts totaling the sum of $2,651.83, which funds were placed in his privite attorney trustee account, and not in a seperate guardianship account.

3. Prior to the time distribution and payment of said funds was made by Respondent, the trustee account into which said funds were deposited was overdrawn twenty-five (25) times in the period from November 8, 1968, through July 1971.

4. Respondent made final distribution of such Guardianship in April 1972, but did not file an accounting in the Probate Court until September 12, 1977.

5. Respondent has violated Canon 11 of the Cannons of Professional Ethics and DR 1-102(A)(1)(3)(4)(5)(6), DR 6-101 (A) (3), DR 9-102(A) (1) and (2) and DR 9-102(B) (3) of the Code of Professional Responsibility.

COUNT XII

1. Respondent was employed to serve as attorney in the following listed 18 Probate Court proceedings, and has failed and neglected to complete the legal work involved in those matters.

a. Case No. 1280, Estate of Terry K. Heller, deceased.
Died July 16, 1966.
Lois Haller, RFD 1, Crooksville, Ohio, Administratix.
Donovan Lowe, Attorney of Record.
December 6, 1966, final Account filed, approved and Administratrix released. Court costs of $48.50 not paid. (Respondent has had an Administratrix check for court costs in his possession since December of 1967 and has neglected to pay the same to the Probate Court.)

b. Case No. 2024, Estate of Earl Phillips, deceased.
Died December 23, 1958.
December 2, 1970, Will filed. January 23, 1971, Will admitted to Probate and Record. No fiduciary appointed. Respondent is Attorney of Record.

c. Case No. 2106, Estate of Gladys H. Wilkinson, deceased.
Died February 25, 1970.
Administrator, Urshel P. Wilkinson, Rt. 1, Reinersville, Ohio.
Respondent is Attorney of Record.
Last entry shown on Probate Court docket April 11, 1972, Determination of Estate Tax.

d. Case No. 2148, Estate of Harry A. Triplett, deceased.
Died August 3, 1971.
Administratrix Glossie Triplett of Chesterhill, Ohio.
Respondent is Attorney of Record.
Last entry of the docket August 4, 1978 -Proof of publication filed.

e. Case No. 72-66, Estate of hazel Silvus, deceased.
Died January 6, 1972.
Will filed January 6, 1972.
Will admitted to Probate February 26, 1972.
Respondent is Attorney of Record - no further entries on docket.

f. Case No. 73-180, Estate of Sherman Lett, deceased.
Died February 1, 1973.
February 27, 1973, Will filed.
March 8, 1973, Will admitted to Probate.
Respondent is Attorney of Record - no further entries on docket.

g. Case No. 74-12, Estate of James H. Mills, deceased.
Died January 27, 1974.
Respondent is Attorney of Record.
February 1, 1974, Will filed.
May 9, 1975, Final Determination of Estate Tax filed -last entry on docket.

h. Case No. 74-160, Estate of Hazel B. Demster, deceased.
Died November 25, 1974.
December 16, 1974, Will admitted to Probate and Record.

Respondent is Attorney of Record - no further entries on docket.

i. Case No. 75-10, Estate of Erma Bernice McMannes, deceased.
Died December 15, 1974.
May 27, 1976, Final Determination of Ohio Estate Tax filed - last entry on docket.
Respondent is Attorney of Record.

j. Case No. 75-48, Esta' of David Osborne, deceased.
Died April 29, 1975.
Executrix, Marjorie Osborne.
Respondent is Attorney of Record.
May 9, 1975, Will filed.
November 3, 1975, Inventory approved - no further entries on docket.

k. Case No. 76-27, Estate of Delma L. Curby, deceased.
Died January 28, 1976.
March 9, 1976, Application for letters of authorities.
April 2, 1976, Proof of Publication of Appiontment filed - no further entry on docket.
Respondent is Attorney of Record.

l. Case No. 76-53, Estate of Freda Kirk, deceased
Died August 17, 1973
April 21, 1976, Application for letters of Administration filed.
May 25, 1976, Affidavit in Lieu of Schedule of Claims filed and approved - no further entries on docket.
Respondent is Attorney of Record.

m. Case No. 76-56, Estate of John Adrian, deceased.
Died January 25, 1912
June 1, 1976, Inventory and Appraisal approved - no further entries on docket.
Respondent is Attorney of Record.

n. Case No. 76-113, Estate of Charles W. Wagner, deceased.
Died September 10, 1976.
Respondent is Attorney of Record.
October 12, 1976, Will filed.
December 15, 1976, Fiduciary Acceptance filed - no further entries on docket.

o. Case No. 77-05, Estate of Lynne Conley, deceased.
Died December 27, 1976.
Respondent is Attorney of Record.
January 13, 1977, Will filed.
April 28, 1977, Preliminary notice of non-taxable estate filed no further entry on docket.

p. Case No. 77-15, Estate of Harry F. Davis, deceased.
Died November 30, 1975.
Respondent is Attorney of Record.
February 9, 1977, Will filed.
February 24, 1978, Ohio Estate Tax charge filed - no further entry on docket.

q. Case No 77-31, Estate of Edna Simcox, deceased.
Died March 2, 1977.
Respondent is Attorney of Record.
March 8, 1977, Will filed.

March 10, 1977, Proof of Publication of Appiontment filed - no further entries on docket.

r. Case No. 513, Guardianship of Robert Lee McLaughlin,
Minor age 15 years.
May 1, 1962, Application filed by Lura M. Salyers.
May 3, 1962, Notice of hearing - no further entries on docket.
Respondent is Attorney of Record.

2. Respondent has violated DR 6-101 (A) (3) and 7-101 (A) (2) of the Code of Professional Responsibility.

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Counsel for Relator

(Name and Address of Counsel to be Typed)

BEFORE THE BOARD OF COMMISSIONERS ON

GREIVANCES

AND DISCIPLINE

OF

THE SUPREME COURT OF OHIO

In re; Complaint against
Harry Donovan Lowe, aka
Donovan Lowe
Respondent No. 312

Ohio State Bar Association

Relator

REPLY BRIEF OF THE RESPONDENT, H. DONOVAN LOWE

Stanley E. Preiser
Frederick D. Fahrenz
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REPLY BRIEF OF THE RESPONDENT, H. DONOVAN LOWE

Respondent H. Donovan Lowe, by counsel, respectfully submits this reply brief in the above-captioned case as a supplement to his original brief, in lieu of oral arggument. The respondent will not follow the structural form of his first brief, but rather will reply to the Bar's brief which argued the issues count by count. However, the initial section of this brief will contain an introductory statement applicable to each count.

INTRODUCTION

(A) Total Lack of Specificity of Charges

Counsel for the respondent respectfully submits that the charges against Donovan Lowe are woefully lacking the requiste specificity which would satisfy the due process requirments of the Constitution of the State of Ohio and the Constitution of the United States. The respondent was unable to argue specifics in his initial brief due to the scattergun approch taken by the Bar in its allegations of impropriety. Even at the hearing held in this matter, the charges were so imprecise and nebulous that it was difficult for counsel to argue responsively. A cursory reading of the transcript of the hearing amply demonstrates the total lack of specificity of the charges.

The most blatant example of this slipshod pleading and proof is the fact that, in almost every count of the complaint, the Bar alleged that Donovan's actions constituted illegal conduct. Incredibly, the Bar cited no statues, either federal or state, of which the alleged conduct was violative. The reason for this is very simple: Donovan Lowe did not violate any law of the United States or of the State of Ohio. The only possible explanation for the Bar's approach is that it hoped by firing its

scattergun blindly in all directions, one or two pellets might strike home. This may be proper procedure on a hunting trip; but when a man's very liveihood is at stake, such procedure is constitutionally defective.

(Note: The remainder of this Brief is deleted as not relevant to this petition.)

BEFORE THE BOARD OF COMMISSIONERS ON

GREIVANCES

AND DISCIPLINE

OF

THE SUPREME COURT OF OHIO

In re:
Complaint against:
Harry Donovan Lowe,
Respondent,
Ohio State Bar Association,
Relator.

CASE NO. 312
FILED: Jan. 16, 1981

Findings of Fact and Recommendation
of the Board of Commissioners on
Grievances and Discipline of
The Supreme Court of Ohio

The Ohio State Bar Association filed a complaint against the Respondent, Harry Donovan Lowe, setting forth twelve counts of alleged violations of the Code of Professional Responsibility. A pre-trial hearing was held by the panel at the office of the Columbus Bar Association June 29, 1979, as a result of which extensive stipulations were later entered into.

By agreement, a hearing was held at the Legal Center of the Ohio State Bar Association in Columbus, Ohio, beginning April 14, 1980, and lasting four days. Further testimony was heard June 16 and 17, 1980. The Bar Association was represented by John R. Welch,

Albert L. Bell, William L. Clark and Emerson Cheek, III, all of Columbus. The Respondent was represented by Stanley E. Preiser and Frederick D. Fahrenz of Charleston, West Virginia. Seven volumes of testimony were taken, eighty some exhibits considered, and extensive briefs and reply briefs filed. The hearing was held in private at respondents's request.

Harry Donovan Lowe was engaged in the private practice of law in McConnelsville, Ohio, with an extensive civil and probate practice. He was a director and attorney for the Malta National Bank. Many of its loans cleared through his office, the funds going through his books. From October 30, 1958, to January 6, 1969, and from July 31, 1973, to January 2, 1977, he was also Prosecuting Attorney of Morgan County.

As prosecutor, he received a 'furtherance of justice fund' equal to half his salary. Respondent used this fund to purchase a stenotype machine and to pay for training his secretary to use it. He did not include the stenotype machine in his inventory of county property held by him.

Arthur Dille and five of his sons operated a saw mill as a partnership. They had an exclusive contract with Stone Container Co. to sell them all their wood chips. These were made by cutting slabs into one-half inch chips, which they delivered to the container company 120 miles away. For this they received $3.50 per ton.

In 1968, Arthur Dille recived an offer from Interlake Iron, Inc., to buy one and one-half inch chips for $9.25 per ton, and Dille would only have to haul them thirteen miles. Dille came to respondent to see if there was some way they could get out of their exclusive contract with Stone Container. Lowe suggested that they form a corporation, and that the partnership sell the slabs to the corporation, which would then cut them into chips which the partnership would then deliver to Interlake. Respondent then incorporated Morgan County Wood Chips, Inc. The directors and shareholders were

to be Arthur Dille, his wife and five sons, respondent, and David Osborne, vice-president of the Malta National Bank. Each was to own three shares at $1.00 per share. Osborne paid in $300, and Respondent credited the cor poration account for legal fees of $300. The profits from the corporation were to be paid out as directors' fees. At the first meeting of directors on November 7, 1968, Arthur Dille was elected president, Carlos Dille vice president, and respondent secretary-treasurer.

To make the new size chips, it was necessary to purchase a new chipper. At the November 7th meeting, purchase of the chipper for $8,504.52 was authorized. The money for this was borrowed from the Malta National Bank. Respondent said that he co-signed the note. The partnership was to be paid $3.50 per ton for labor and $2.50 per ton for the slabs, including the delivery of the chips to Interlake. Respondent's office was to 'bill, invoice and maintain records of transactions of chips. Compensation will be at the rate of 25 cents per ton.'

On July 3, 1974, respondent caused a check for $4,000 on the corporation bank account to be issued to Marjorie Osborne for forty shares of stock of The First National Bank of McConnelsville.

On January 6, 1975, respondent bought seven shares of stock in the Malta National Bank for $7,000, paying for the same out of corporate funds. In May 1975, he purchased three more shares at $1,000 per share.

Although respondent had the stock certificates, they were never transfered to Morgan County Wood Chips, Inc. on either bank's records.

Respondent paid himself legal fees from the corporate account of $2,573.00 on July 19, 1974, $2,527.25 on September 10, 1974 and $2,359.00 on October 17, 1974. Many of the items on the corporate account were for personal services rendered the various members of the Dille family, including personal tax returns, settling accident claims, divorces, mortages, deeds, etc.

David Osborne died on April 29, 1975.

In July 1975, the Dilles contacted Attorney Gerald Mollica, of Athens, Ohio, regarding the corporate and partnership affairs. Mr. Mollica secured the corporate records from respondent and had them audited by Mr. Armstrong.

In August 1975, Attorney Mollica had a call issued for a meeting of the Directors of Morgan County Wood Chips, Inc. Respondent and Mrs. Osborne, now the owner of the late David Osborne's three shares, appeared and informed the Dilles that they didn't own the company, they having never paid for their shares, and that only he and Mrs. Osborne were stockholders.

The directors passed a resolution discharging respondent as legal counsel and cancelling his 25¢ per ton agreement for keeping the books and signing checks.

A civil action followed which was eventually settled.

The Dilles complained to the bar association and the judge and requested that criminal action be taken against respondent. Since respondent was the prosecuting attorney, the court appointed Richard E. Bidwell, Prosecuting Attorney of Muskingum County, as special prosecutor. Indictments totalling 18 counts were returned in the Case Nos. 77 CR 56, 57, 58, 59 and 60.

The cases came to trial in Pickaway County before Judge William Ammer, sitting by assignment. During the second day of the trial, the judge told counsel to enter pleas of guilty to three misdemeanors to be selected by them.

After hours of plea bargaining negotiations, on the next day, May 4, 1977, respondent entered pleas of no contest to three charges, and the court found him guilty and sentenced him as follows, dismissing the other charges with prejudice:

(1) In Case No. 77 CR 56 on the first count, to the lesser included offense of unauthorized use of property under R.C. 2913.04(A) by permitting his secretary to use

the stenotype machine without consent of the owner, for which he was sentenced to thirty days in the Pickaway County jail, and fined $200.

(2) In Case No. 77 CR 56 on the second count, to failure to file his 1975 Inventory on time, which constitutes the crime of dereliction of duty, under R.C. 2921.44(E), for which he was sentenced to ninety days in the Pickaway County jail, and fined $700.

(3) As to Case 77 CR 58, the respondent waived in writing in open court the prosecution of the offense by indictment and presentment to a grand jury and entered his plea to an information charging him with the offense of failure to report a crime under R.C. 2921.22(A), for which he was found gulty and sentenced to thirty days in the Pickaway County jail and fined $100.

The sentences were to be served concurrently, and respondent was to pay all costs over and above the deposits previously made for witness fees, not to exceed $1,000 over the amounts previously deposited.

Execution of the sentences was suspended upon the condition that the respondent not violate any laws of the United States, or any other state, or any municipality within this state within the next year.

No information was ever filed on the third offense. The relator contends that it related to the felony Count V in the indictment which charged respondent with having misrepresented to the insurance company that Morgan County Wood Chips, Inc., had ten or more full time employees who worked thirty or more hours a week, having included himself, his secretary and David Osborne as employees in order to have the required ten employees, and as a result of which the insurance company paid out $10,000 upon David Osborne's death; that this offense was agreed upon by counsel, they having initialed a yellow sheet during plea bargaining. Respondent's attorney claims that the prosecuting attorney couldn't be guilty of failing to report to himself on himself, and that

if respondent was asked by the judge what the offense was that he failed to report, he was to say the offense of Arthur Dille depositing in the partnership account of the Merrill Lynch check for $10,000 payable to the corporation (which he had apparently done on the advice of his attorney, Gerald Mollica, while the corporate affairs were in litigation.) The judge didn't ask and there is nothing in the court record to show what the offense was the respondent failed to report.

Respondent's conduct was referred to the Ohio State Bar Association which brought these charges. Mr. Lowe is no longer prosecuting attorney. He is no longer a director of the bank, although the bank's refusal to submit his slate of director's, including himself, to the shareholders was litigated in federal court. And respondent has had a divorce.

Count I: The office of prosecuting attorney in many counties is a part-time occupation, and prosecutors are expected to have a private law practice at the same time as performing their official duties. Prosecutors are given a fund equal to half their salary, the money to be used for the furtherance of justice and accounted for each year.

Although the respondent pled no contest to the charges of permitting his secretary to use the stenotype machine, which he had purchased from his furtherance of justice fund, with the consent of the owner, and of failing to file his 1975 Inventory on time, the Board does not find that these offenses constituted a violation of the sections of the Code of Professional Responsibility with which he was charged, and dismisses the charges in Count I.

Count II: For a prosecuting attorney to plead no contest and be found guilty to a criminal charge of failure to report a crime should render him guilty of con-

duct violating the Code of Professional Responsibility. However, the plea bargaining resulted in the dismissal with prejudice of all other counts in the indictments, than the two set forth in Count I above.

The failure of the special prosecutor to reduce to writing the information on which the plea was based renders it impossible for the offense to be evaluted. It could not have been the one in the indictment referred to as V, because that was a felony and was dismissed and could not have included a lesser offense which would be a misdemeanor. Count II is dismissed for lack of proof.

Count III: Respondent is charged with depositing his prosecuting attorney's furtherance of justice funds in his private attorney trustee account which was repeatedly overdrawn. The prosecutor is required to file an annual report as to how he used his allowance. There was no evidence that he failed to acount for all his funds. Count III is dismissed.

Count IV: Respondent was attorney for the Estate of Blance Norris who had a 49-acre farm appraised at $6,000 on which there was a lien of $9,416.99 in favor of the Welfare Department of the State of Ohio. Mr. Norris wanted to sell the farm and move in town. Respondent brought an action to sell the farm to pay debts. He sold the farm to his friend, James C. Davis, Director of Public Welfare for Morgan County, for $6,000, transferring the lien to the in-town property worth $4,825 with the consent of the Attorney General's office. The transfer was not to Davis, who was said to be having marital troubles, but to Mr. Shaw, who was used as a "straw man." Mr. Shaw and Mrs. Shaw conveyed to Davis. Respondent represented to the probate court that he was selling the property to Shaw for $6,000 cash, which was not true. Although on its face the transaction appears suspect, and although respondent misrepresented to the probate court the true buyer, there is no evidence that the respondent did anything illegal or

that the estate was harmed.

The relator claimed that respondent as prosecuting attorney had a duty to protect the state. Respondent's duty was to the estate, and apparently he satisfied the beneficiary's wishes in making the sale. He secured $6,000 and purchased the property in town for Norris for $4,825, and the lien was transferred to that property.

It should be pointed out that respondent was not the prosecuting attorney form January 6, 1969, to July 31, 1973. The journal entry authorizing the sale was dated August 6, 1970, the Report of Private Sale to William Shaw for $6,000 cash, August 12, 1970. The Executors Deed of Glen Norris to Shaw was dated August 6, 1970, but was not filed until June 5, 1972. It is interesting to note that James C. Davis, as Director of Morgan County Welfare, certified on July 28, 1970, the transfer of the April 30, 1962, lien from the farm to the property in the Village of McConnelsville purchased by Glen Norris.

The respondent was guilty of misrepresentation to the court as set forth in DR 1-102 (A) (4) and DR 7-102 (A) (3).

Count V: The respondent is charged with borrowing against duplicate certificates of title to the same car.

On November 20, 1973, respondent purchased a 1974 Plymouth station wagon for $5,200 and obtained a loan from the Malta National Bank for $5,200, signing a security agreement and giving them the certificate of title. The lien was not recorded, and the bank returned the certificate to respondent.

On December 6, 1973, respondent secured a $4,000 loan from the First National Bank of McConnelsville and gave them the certificate of title to the same vehicle. The note had the notation, "C.M. 1974 Plymouth." The lien was not recorded.

The bank examiners appeared, and on March 13, 1974, respondent caused a duplicate certificate of title to be secured and delivered to the Malta National Bank, which recorded its lien on the duplicate April 4, 1974.

On April 12, 1974, the First National Bank of McConnelsville recorded its lien on the original certificate of title.

The clerk of courts called the respondent and told him that he had liens on two titles to the same car. Respondent then paid off his loan at First National on April 16, 1974.

Respondent claims that it never was intended that either bank have a lien, that the papers were only to be used in case the bank examiners came, and what was wrong with that? The Board believes such conduct violates DR 1-102 (A) (4) and (6) of the Code of Professional Responsibility.

Count VI: Respondent as secretary-treasurer of Morgan County Wood chips, Inc. issued checks to himself for attorney fees: July 19, 1974, $2,573.00; September 10, 1974, $2,527.25; and October 17, 1974, $2,359.00, for a total of $7,459.25. He did this without informing the Dilles or seeking directors' approval. There is no claim that the fees were not reasonable.

The payment of legal fees in such a manner was poor public relations, but was not without authority, except to the extent that the corporation was charged for services rendered to the Dilles personally for matters not related to the corporation. However, the payments were made by respondent as an officer of the corporation, not as its attorney. The Board does not find that the respondent as an attorney converted funds to his own use in violation of the sections charged.

Count VII: On July 3, 1974, respondent purchased forty shares of stock of the First National Bank of McConnelsville from Marjorie Osborne for $4,000, the stock being paid for with a check on the Morgan County Wood Chips, Inc., account. Mrs. Osborne signed the stock certificate in blank and put it in the shoe box of Morgan County Wood Chip's papers kept by her husband. The stock was never transferred to the corporation on the bank's records. The December 1974 dividend

of $60 was paid to Mrs. Osborne, and her husband deposited it in the corporation bank account.

A year later, when the break-up was taking place, respondent's parents gave a check for $4,000 payable to Marjorie Osborne. Respondent, with her consent, endorsed the check and deposited it in the corporation's bank account. Mrs. Osborne testified that, on August 8, 1975, she came to respondent's office and acknowledged her signature which was on the certificate and which had now been filled in, transferring twenty shares each to R.D. Lowe and Mildred Lowe. Mrs. Osborne thinks she gave the June dividend check to respondent. On November 15, 1975, the stock was transferred on the books of First National Bank to Mr. and Mrs. Lowe.

Respondent is guilty of violating DR 1-102 (A) (4) and (6) of the Code of Professional Responsibility.

Count VIII: On January 6, 1975, respondent issued a bank counter check in the sum of $7,000 drawn on the account of Morgan County Wood Chips, Inc., payable to the Malta National Bank. This was for the purchase of seven shares of stock in the Malta bank being sold by retiring President Walter Giles. However, the stock certificates were issued as follows: respondent, Donovan Lowe, four shares; Marjorie Osborne, two shares; David Osborne, one share.

On July 24, 1975, attorney Gerald Mollica requested the corporation records.

On July 28, 1975, three days before the respondent delivered the Morgan County Wood Chips, Inc., records to Mollica, respondent made a deposit in the company's bank account, including an item marked on the deposit slip as sale of stock for $7,040.

Respondent claims that when the original purchase was made, he had separate assignments made to the company and attached them to the stock certificates, and that, in July, he made new assignments transferring the stock to respondent, Donovan Lowe.

The seven shares of Malta National Bank stock were never transferred on the books of the bank to Morgan County Wood Chips, Inc.

Even if it were true that separate stock assignments were signed and attached to the certificates and kept under his secretary's typewriter, as respondent and his secretary both claimed, and even if it were true that the bank directors had an oral agreement that only directors or their families could buy the Giles stock, which both Dr. Henry Blackman and Judge Carlos Riecher, directors of the bank, denied they knew anything about, the fact remains that corporation funds were used to buy the stock, but the stock was never put in the corporation's name on the books of the bank. No separate assignments were ever presented in evidence.

Respondent was guilty of violating DR 1-102 (A) (4) and (6) of the Code of Professional Responsibility.

Count IX: On May 6, 1975, respondent received from Merrill Lynch a check for $3,500 payable to Morgan County Wood Chips, Inc., which he endorsed as secretary-treasurer and deposited, not in the corporation bank account, but in his own trustee account.

Respondent then transferred $3,800 from his trustee account to his office account. Respondent claims that he used $3,000 of the corporate funds to purchase three shares of Malta National Bank stock from his wife, Debra, and credited the remaining $500 on the corporate bill owed him for attorney fees. Debra Lowe testified that she signed the stock certificate assignment to Morgan Wood Chips, Inc., and that although she did not actually receive the $3,000, it was deposited in respondent's office account which they both used.

Respondent says that these three shares in the Malta Bank were purchased to go with the seven already owned so that they would have the ten shares necessary for Arthur Dille to qualify if he were elected a director of the bank.

The Malta National Bank stock was never placed in

the name of Morgan County Wood Chips, Inc., on the bank stock register.

In July 1975, about the time of the split-up, respondent, attorney and secretary-treasure of Morgan County Wood Chips, Inc., sold the shares to himself and deposited $3,000 plus a $30 divident in the corporation bank account.

Respondent is guilty of violating DR 1-102(A)(3)(4)(6) and DR 9-102 (B) (1) and (3) of the Code of Professional Responsibility.

Count X: Respondent is charged with having 462 overdrafts in his office account at the Malta National Bank between February 10, 1969, and December 31, 1975. Respondent was a stockholder, director and legal counsel for the bank. None of his checks were returned for insufficient funds, although Mr. Wilson, vice-president of the bank, thought that one check may have been returned during a shareholders fight which caused a split in the Board of Directors, with respondent on the minority side.

Respondent's secretary testified that when the checks were issued, there was always a balance on her books, but that she may have been a day or two late in making her deposits.

The relator failed to prove that the respondent violated the Code of Professional Responsibility, and Count X was dismissed.

Count XI: On September 27, 1968, respondent was appointed guardian of Glen B. Woodward, an incompetent. Between then and September 12, 1977, when he filed his first and final account, he received and disbursed $2,561.83 which he placed in his trustee account along with other trustee funds, and not in a separate guardianship account. Final distribution was in April 1972. The account was not filed until September 12, 1977.

Between November 8, 1968, and July, 1971, the

trustee account was overdrawn 25 times, many of which could have been due to "late deposits" or funds in transit.

There was no evidence that Glen Woodward ever failed to receive any funds to which he was entitled.

Although this guardianship was not handled in an ideal manner, particularly respondent's waiting five years after the final distribution to file the first and final account, nevertheless the charges in this count are dismissed.

Count XII: This count involved 17 Probate Court matters in which respondent served as attorney and is charged with failing and neglecting to complete the legal work involved:

(a) Estate of Terry N. Heller. Died July 16, 1966. Final account dated March, 1968, but not filed until August, 1972. Court costs not paid.

(b) Estate of Earl Phillips. Died December 23, 1958. Will filed December 2, 1970. Admitted to probate January 23, 1971. No fiduciary ever appointed. Another attorney eventually completed the estate. Respondent syas he did all he was hired to do.

(c) Estate of Gladys H. Wilkinson. Died February 25, 1970. Administrator appointed. Determination of Estate Tax April 11, 1972. After these charges filed, respondent transferred the real estate to her husband, filed a statement in lieu of account, paid the court costs, and closed the estate December 27, 1979.

(d) Estate of Harry A. Triplett. Died August 3, 1971. His wife Glossie appointed administratrix. After she died, her son brought the papers to respondent April 10, 1980. Accounting completed May 20, 1980, after the first hearing of this case.

(e) Estate of Hazel Silvus. Died January 6, 1972. Will filed June 6, 1972, and admitted to probate February 26, 1973. No assets. M. Silvus paid the $12 court costs April 11, 1980.

(f) Estate of Sherman Lett. Died February 1, 1973. Will filed February 27, 1973, and admitted to probate March 8, 1974. No assets. Respondent paid costs April 11, 1980.

(g) Estate of James H. Mills. Died January 27, 1974, age 96. Will filed February 1, 1974. Executrix his wife Ella, ill and incompetent, and sole beneficiary. Final account filed November 22, 1978. Signature on the account notarized May 9, 1975.

(h) Estate of Hazel B. Demster. Died November 25, 1974. Will admitted to probate December 16, 1974. No assets. Respondent only requested to file will. Costs not paid.

(i) Estate of Erma McMannes. Died December 15, 1974. Determination of Estate Tax May 27, 1976. Executor died. Records lost. Respondent had copies of checks made from bank records and closed the estate May 27, 1980.

(j) Estate of David Osborne. Died April 29, 1975. Will filed May 9, 1975. Marjorie Osborne appointed Executrix. Inventory filed November 3, 1975. Final account filed April 2, 1980, just prior to commencement of these proceedings. Respondent says delay due to controversy with the Dilles, the criminal investigations and civil suits.

(k) Estate of Delma L. Curby. Died January 28, 1976. Application for letters March 9, 1976. She had

been injured in an automobile accident, and respondent instituted suit. Subsequently she died. Civil suit settled. Quaere, did she die of stroke or prior injuries? (Her husband was elderly and crippled.) Only assets were proceeds of civil suit. Final account filed March 11, 1980.

(l) Estate of Freda Kirk. Died August 17, 1973. Application for letters filed april 21, 1976. Affidavit in lieu of schedule of claims filed May 25, 1976. Sole asset, real estate. Sole heir, husband. Transfer of real estate May 1976. Statement in lieu of and for an account signed in May 1976. Not filed until November 1978.

(m) Estate of John Adrian. Died January 25, 1912. June 1, 1976, inventory and appraisal approved. Statement in lieu of account dated October 14, 1977, but not filed until November 8, 1978. Respondent says he was retained April 16, 1976, to help remove a cloud on title to certain real estate in name of decedent who died in 1912. Difficulties incurred in constructing family tree and naming all proper defendants in quiet title action.

(n) Estate of Charles W. Wagner. Died September 10, 1976. Will filed October 12, 1976. Fiduciary acceptance filed December 16, 1976. In June, 1979, the fiduciary, decedent's son, was cited for failure to file an inventory and appraisal. It was filed July 10, 1979. According to the respondent, the sole asset of the estate was 400 acres of land which decedent left to his four daughters with the exception of the oil and gas rights, which he left to the four daughters and his son, the executor. Several oil wells were drilled. There was dissension among the heirs as to the division of the assets, two of the daughters retaining their own counsel. The Executor finally told the sister to have their attorney conclude the matter, and in April or May 1980 respondent was discharged as counsel.

(o) Estate of Lynne Conley. Died December 27, 1976. Will filed January 13, 1977. Preliminary tax notice filed April 28, 1977. According to respondent, the estate was relieved of administration January 24, 1977, and nothing more needed to be done. In December 1978, the administrator, decedent's husband, paid the court costs. However, Exhibit 12-10, a petition for authority to transfer a motor vehicle, was signed in December 1978 and filed the same month. The motor vehicle had been ordered transferred in early 1977. The Ohio tax return was filed April 28, 1978, having been signed the day previous.

(p) Estate of Harry F. Davis. Died November 30, 1975. Will filed February 9, 1977, and according to respondent, relieved of administration. Decedent's brother paid the money out of the checking account to a funeral home for funeral expenses February 24, 1978. Respondent secured a tax release December 27, 1979. Respondent paid the court costs out of his own pocket.

(q) Guardianship of Robert Lee McLaughlin, a minor, age 15. May 1, 1962, Robert's mother, Lura M. Salyers, was appointed his guardian in order to get social security benefits for him. According to respondent, they moved to Florida, and he hasn't seen or heard from them since. He was hired only to secure the appointment.

It is clear that respondent was not attentive to many of his probate court responsibilities. He admitted that he had previously been investigated by the bar association in 1972 on some 50 probate matters, that after appearing before the committee he concluded most of the matters, and that no charges were filed. Now he finds himself in a similar situation. And again he has concluded many of the estates. None of the parties involved have appeared to testify against respondent. Nevertheless, he has

violated DR 6-101 (A) (3) of the Code of Professional Responsibility.

As stated by the Supreme Court of Ohio, one of the fundamental tenets of the professional responsibility of a lawyer is that he should maintain a degree of personal and professional integrity that meets the highest standard. The integrity of the profession can be maintained only if the conduct of the individual attorney is above reproach.

The contentions that a violation amounts to only a minor offense not involving moral turpitude does not excuse an attorney from living up to the Code of Professional Responsibility.

Although the respondent pled guilty to three misdemeanors, had repeated overdrafts, paid himself fees without consulting his real client, and did not maintain a spearate guardianship bank account, the Board recommends that Counts I, II, III, VI, X and XI be dismissed.

The Board finds that respondent violated the Code of Professional Responsibility as set forth in Counts IV, V and XII and that he should be given a public reprimand on those accounts.

The Board of Commissioners on Grievances and Discipline finds that Respondent, Harry Donovan Lowe, violated the Code of Professional Responsibility as alleged in Counts VII, VIII and IX, DR 1-102 (A) (4) and (6), and in Count IX he also violated DR 9-102 (B) (1) and (3), and that for each of these counts he should be given an indefinite suspension from the practice of law.

Chairman, Board of Commissioners on
Grievances and Discipline of
The Supreme Court of Ohio

Secretary, Board of Commissioners on
Grievances and Discipline of
The Supreme Court of Ohio

IN THE SUPREME COURT OF OHIO

OHIO STATE BAR ASSOCIATION,
Relator,

v. No. DD-0081-1

HARRY DONOVAN LOWE,
Respondent.

OBJECTIONS OF THE RESPONDENT, HARRY DONOVAN LOWE, TO THE FINDINGS AND RECOMMENDATIONS OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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RESPONDENT'S, HARRY DONOVAN LOWE, OBJECTIONS TO THE FINDINGS AND RECOMMENDATIONS OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

Comes now the respondent, Harry Donovan Lowe, by counsel, and respectfully submits that the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio in their "findings and Recommendations" filed with Court on January 16, 198 (sic) were in error for the following reasons:

1. Concerning Counts VII, VIII and IX, the Board of Commissioners erred in applying the definition of "dishonesty", "fraud", "deceit", and/or "misrepresentation" proscribed in DR 1-102 (A)(4) to the facts adduced at the hearing on this matter and their finding of misconduct was clearly not supported by the facts;

2. That DR 1-102 (A)(6) which prohibits "and other conduct that adversely reflects on his fitness to practice law" is void on its face for vagueness;

3. That it was plain error, even assuming arguendo the DR 1-102 (A)(6) is constitutional, to find that respondent's conduct was in fact a violation of said disciplinary rule;

4. That it was plain error for the Board of Commissioners, wholly supported by the facts adduced at the hearing, to find respondent's conduct in Count IX was violative of DR 1-102 (A)(3);

5. That the application of Canon IX of Code of Professional Responsibility was improperly applied by the Board of Commissioners to the facts set out in Count IX of the complaint;

6. That it was plain error for the Board of Commissioners to find any "misrepresentation: in violation of either DR 1-102 (A)(4) or DR 1-102 (A)(3) under the facts adduced at the hearing concerning Count IV of the Complaint;

7. That the Board of Commissioners failed to apply the definitions of "dishonesty", "fraud", "deceit", and/or "misrepresentation" to the facts contained in Count V of the Complaint and therefore their finding of misconduct is contrary to the law of the State of Ohio and not supported by the facts adduced at the hearing.

8. The finding of neglect on the part of the respondent in County XII of the Indictment is clearly not supported by the evidence adduced at the hearing and the finding of misconduct thereunder was plain error.

WHEREFORE, respondent respectfully submits that this Complaint, and all Counts thereof, should properly have been dismissed by the board of Commissioners and he objects to the findings of misconduct and the punishment recommended by the Board of Commis sioners and asks that said Complaint be dismissed by this Honorable Court.

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IN THE SUPREME COURT OF OHIO

OHIO STATE BAR ASSOCIATON
Relator,

v. No. DD-0081-1

HARRY DONOVAN LOWE,
Respondent

RESPONDENT'S BRIEF IN SUPPORT OF HIS-OBJECTIONS TO THE FINDINGS AND-RECOMMENDATIONS OF THE BOARD OF COM-MISSIONERS ON GRIEVANCES AND DISCILINE

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PROPOSITION OF LAW NO. 2

The respondent respectfully submits that DR 1-102(A)(6) on its face is constitutionally infirm as it violates the Fourteenth Amendment to the Constitution of the United States in that it is so vague and indefinite as to not adequately and fully inform potential offenders of the conduct proscribed. The potential for abuse of this section of the disciplinary rules is obvious on its face. Instead of defining the conduct it proscribes, it leaves to the whim and unfettered discretion of Bar authorities the conduct to be proscribed. To a profession that prides itself on advancing the rights of all Americans it would be indeed sad to allow such a vague and indefinite rule to pass the muster of constitutional scrutiny.

It is basic black letter law that: "The constitution requires that a statute must not be too vague to allow the citizen to ascertain what course of conduct he must follow to put himself safely within the bounds of the law." United States v. Five Gambling Devices, 346 U.S. 441, 458, 98 L.Ed. 179, 192 74 S.Ct. 190 (1953). That same year the Supreme Court, in a case involving the disciplinary proceedings of a physician, held that a state statute authorizing disciplinary action was constitutionally permissible and was not "unconstitutionally vague, since the discretion left to enforcing officers is not one of defining the offense, but merely that of determining the appropriate penalty." Barsky v. Board of Regents of N.Y., 347 U.S. 442, 98 L.Ed. 829, 830, 74 S.Ct. 650 (1953).

The respondent respecfully submits that the proscription of engaging "in any other conduct that adversely reflects on his fitness to practice law" is blatently leaving the discretion to the Ohio Bar Association of "defin-

ing the offense" and therefore is violative of the due process clause of the United States Constitution and void for vagueness.

(The remainder of this Brief is deleted as not being reletave to this petition.)

IN THE SUPREME COURT OF OHIO

OHIO STATE BAR ASSOCIATION,
Relator,

v. No. DD-0081-1

HARRY DONOVAN LOWE,
Respondent.

REPLY BRIEF OF RESPONDENT

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Counsel for Respondent

PROPOSITION OF LAW NO. 2

If the relator's position concerning the court being the final arbitrator and determinatant of what conduct violated DR-102(A)(6) were correct, then no stature, rele or regulation could be held void for vagueness in that a judicial tribunal always presides over the enforcement of the law, regulation or rule and any void for vagueness would be cured by that fact alone.

The respondent respectfully stands by its law cited in its initial brief and submits that DR-102(a)(6) is void for vagueness.

(The remainder of this Brief is deleted as not being relevant to this petition.)

STATE OF OHIO,
CITY OF COLUMBUS.

Ohio State Bar Association,
Relator
v.
Harry Donovan Lowe,
Respondent.

The Supreme Court of the State of Ohio
Of the Term of January, 1981
To-wit: July 22, 1981

ON CERTIFIED REPORT BY THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

DD No. 81-1

O R D E R

It appearing to the Court that the Board of Commissioners on Grievances and Discipline filed its Final Report in this Court on January 16, 1981, recommending that the respondent, Harry Donovan Lowe, be indefinitely suspended from the practice of law pursuant to Rule V, Section 6b of the Supreme Court Rules for the Government of the Bar of Ohio, and it further appearing

that respondent filed objections to the Final Report of the Board of Commissioners on Grievances and Discipline, this cause was argued by counsel. On consideration thereof, it is ordered and adjudged by this Court that the respondent, Harry Donovan Lowe, be indefinitely suspended from the practice of law pursuant to Rule V, Section 6b of the Supreme Court Rules for the Government of the Bar of Ohio.

The respondent, Harry D. Lowe, is hereby ordered to cease and desist from the practice of law in any form and is forbidden to appear on behalf of another before any court, judge, commission, board, administrative agency or other public authority. It is further ordered that he be forbidden to counsel or advise, or prepare legal instruments for others or in any manner perform services of any kind for others which would constitute the practice of law. He is also forbidden to hold himself out to another or to the public as being authorized to perform legal services, and he is hereby divested of each, any and all of the rights, privileges and prerogatives customarily accorded to a member in good standing of the legal profession of Ohio.

It is further ordered that the respondent, Harry D. Lowe, surrender his certificate of admission to practice to the Clerk of this Court forthwith and that his name be stricken from the roll of attorneys maintained by this Court.

It is further ordered that the respondent, Harry D. Lowe, pay the costs of these proceedings taxed in the amount of Seven Thousand One Hundred Nineteen Dollars and sixty-six cents. ($7,119.66).

It is further ordered that , on or befoe August 21, 1981 respondent shall:

1. Notify all clients being represented in pending matters and any co-counsel of his suspension and his consequent disqualification to act as an attorney after the effective date of this order, and, in the absence of co-

counsel, also notify the clients to seek legal service elsewhere, calling attention to any urgency in seeking the substitution of another attorney in his place;

2. Regardless of any fees or expenses due respondent, deliver to all clients being represented in pending matters any papers or other property pertaining to the client, or notify the clients or co-counsel, if any, of a suitable time and place where the papers or other property may be obtained, calling attention to any urgency for obtaining such papers or other property;

3. Refund any part of any fees or expenses paid in advance that are unearned or not paid, and account for any trust money or property in possession or control of respondent;

4. Notify opposing counsel in pending litigation or, in the absence of counsel, the adverse parties, of his disqualification to act as an attorney after the effective date of this order, and file a notice of disqualification of respondent with the court or agency before which the litigation is pending for inclusion in the respective file or files;

5. All notices required by this order shall be by certified mail and shall contain a return address where communications may thereafter be directed to respondent.

6. File with the Clerk of this Court and the Disciplinary Counsel of the Supreme Court an affidavit showing compliance with this order, and proof of service of notices required herein. Such affidavit shall also set forth the address where the affiant may receive communications and the Clerk and Disciplinary Counsel shall be kept advised of any change of address;

7. Retain and maintain a record of the various steps taken by respondent pursuant to this order.

It is further ordered that the Clerk of the Court issue certified copies of this order as provided for in Section 20 of Rule V of the Supreme Court Rules for the Government of the Bar of Ohio.

APPROVED:_____CHIEF JUSTICE

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of Ohio do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from Journal 57.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, the 22nd day of July, 1981.

THOMAS L. STARTZMAN CLERK
_____DEPUTY

THE STATE OF OHIO,

City of Columbus,

The Ohio State Bar Association
Relator,

v.

Harry Donovan Lowe,
Respondent.

The Supreme Court of the State of Ohio
Of the Term of January, 1981
To-wit: July 22, 1981

DD No. 81-1
NUNC PRO TUNC ORDER

The Court coming now to consider its opinion issued on July 22, 1981, and reported at 67 Ohio St. 2d 335 and in order to correct certain typographical errors contained therin, hereby orders, nun pro tunc, that the seventh paragraph on P. 335 be corrected to read:

"Fifth, as secretary-treasurer of Morgan County Wood Chips, Inc., respondent endorsed a $3,500 company check and placed it in his own trustee account, and later used the funds to purchase three shares of Malta National Bank stock, causing the board to determine that respondent violated DR-1-102(A)(3), (4) and (6) and DR-9-102(B)(1) and (3)."

and that the first paragraph of the per curiam opinion on P. 336 be corrected to read:

"Upon examination of the record and the findings of the board of commissioners, we conclude that there are ample facts to justify the board's finding that respondent violated DR-1-102(A)(4) and (6), DR-1-102(A)(3), (4) and (6), DR-6-101(A)(3), DR-7-102(A) (3), and DR-9-102(B)(1) and (3) of the Code of Professional Responsibility."

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from Journal 55.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this 1st day of September, 1981.

THOMAS L. STARTZMAN CLERK

_____DEPUTY

OHIO STATE BAR ASSOCIATION *v.* LOWE

[Cite as Bar Assn. v. Lowe (1981), 67 Ohio St. 2d]

Attorneys at law--Misconduct--Indefinite suspension--Acts warranting.

(D.D. No. 81-1--Decided July 22, 1981.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

The Ohio State Bar Association, relator herein, filed a complaint with the Board of Commissioners on Grievances and Discipline pursuant to Gov. R. V, charging Harry Donovan Lowe, respondent herein, with 12 violations of the Code of Professional Responsibility.

After a full hearing comprising seven days of testimony with respondent and his counsel present, the board dismissed six charges, but determined respondent had committed six violations of the Code of Professional Responsibility as enumerated below.

First, respondent was found by the board to have made misrepresenations to the Probate Court concerning land sale proceedings in that court, a violation of DR-1-102 (A)(4) and DR-7-102 (A)(3).

Second, the board found respondent had borrowed money against duplicate certificates of title to the same car, a violation of DR-1-102 (A)(4) and (6).

Third, irregularities pertaining to the purchase and transfer to respondent of common stock in the First National Bank of McConnellsville with funds of Morgan Wood Chips, Inc., a client of respondent, resulted in a determination respondent violated DR-1-102 (A)(4) and (6).

Fourth, respondent's use of $7,000 in funds of his client Morgan Wood Chips, Inc., to purchase seven shares of Malta National Bank issued to respondent, resulted in a determinaton that this violated DR-1-102 (A)(4) and (6).

Fifth, as secretary-treasurer of Morgan County wood Chips, Inc., respondent endorsed a $3,500 company check and placed it in his own trustee account, and later used the funds to purchase three shares of Malta National Bank stock, causing the board to determine that respondent violated DR-1-102(B)(3), (4) and (6) and DR-9-102(B)(1) and (3).

Sixth, the complaint listed 17 estates which respondent failed to handle and complete properly as attorney for the fiduciaries. Most of these estates have been concluded by respondent after charges were filed. For these cumulative delinquencies the board determined respondent violated DR-6-101(A)(3).

The board recommended that counts, I, II, III, VI, X, and XI be dismissed. The board specifically found that respondent violated the Code of Professional Responsibility as set forth in count IV, a violation of DR-1-102(A)(4) and (6) and count XII, a violation of DR-6-101(A)(3), and should be given a pubic reprimand on these counts.

The board found respondent violated DR-1-102(A)(4) and (6) as alleged in counts VII and VIII, and violated DR-1-102(A)(3),(4) and (6), and DR-9-102(B)(1) and (3) as alleged in count IX and unanimously recommended for these violations that respondent be given an indefinite suspension from the practice of law.

Mr. John R. Welch, Mr. Albert L. Bell, Mr. William L. Clark and Mr. Emerson Cheek, III, for relator.

Preiser & Wilson Co., L.P.A., Mr. Stanley E. Preiser, Mr. Frederick D. Fahrenz, for respondent.

Per Curiam. Upon examination of the record and the findings of the board of commissioners, we conclude that there are ample facts to justify the board's finding that respondent violated DR-1-102(A)(4) and (6), DR-1-102(B)(3),(4) and (6), DR-6-101(A)(3), DR-7-102(A)(3), and DR-9-102(B)(1) and (3) of the Code of Professional Responsibility.

Accordingly, respondent is hereby indefinitely suspended from the practice of law.

Judgment accordingly.

CELEBREZZE, C.J., W. BROWN, P. BROWN, SWEENEY, LOCHER, HOLMES AND C. BROWN, JJ., concur.

IN THE SUPREME COURT OF OHIO

OHIO STATE BAR ASSOCIATON
Relator,
v. No. DD-0081-1
HARRY DONOVAN LOWE,
Respondent

MOTION OF THE RESPONDENT, HARRY DONOVAN LOWE, FOR REHEARING

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Counsel for Relator

Filed August 3, 1981
SUPREME COURT OF OHIO
Thomas L. Startzman, Clerk

IN THE SUPREME COURT OF OHIO

Comes now the respondent, Harry Donovan Lowe, by counsel, and moves pursuant to the Rules of Practice of the Supreme Court of Ohio, Rule IX Section 1, for a rehearing in the above-captioned matter. As grounds for said motion, the respondent states as follows:

1. The respondent respectfully submits that this Court was in error in its conclusion on page two of its Opinion where they stated "there are ample facts to justify the board's finding that respondent violated" nine different subsections of the Code of Professional Responsibility.

2. That the short two page Opinion of the Court fails to make a sufficient presentation to allow the respondent to ascertain what facts the Court found to be violative of which provision of the Code of Professional Responsibility.

3. It is readily apparent from the Opinion of the Court that this Court simply, without independent study, adopted the findings and conclusions of the Board of Commissioners on Grievances and Discipline and thereby denied Petitioner due process of law, both procedural and substantive, as provided in the Constitution of the United States and Constitution of the State of Ohio.

4. That the punishment received by this respondent, that is, the denial of this respondent's right to practice his chosen profession, is violative of the Eighth Amendment Cruel and Unusual Punishment Provision and the Fourteenth Amendment as the conduct alleged in the Bar Association Complaint, which the Bar Association failed to prove at the hearing, does not justify the serious punishment imposed by this Court.

5. That the failure of the Court to carefully study the recommendations of the Board of Commissioners on Grievances and Discipline and independently give this respondent his day in Court is vividly illustrated by the fact the Court set forth in its Opinion and Order the wrong disciplinary rule that they found the respondent to

be in violation and this is illustrated by Bar Counsel's letter of July 27, 1981 to Thomas L. Startzman, Clerk of the Ohio Supreme Court, said letter attached hereto as respondent's Exhibit A. As previously stated, this lack of any independent evaluation is violative of respondent's due process rights as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution. The respondent respectfully submits that this Court's procedure in disciplinary matters is and has been simply to adopt the findings of the Board of Commissioners without any variance or discussion and therefore this Court has improperly delegated to the Board its duties and responsibilities and has exercised no independent decision making which is violative of this respondent's procedural due process rights under the aforesaid Constitutional Amendments.

6. That the record is totally devoid of any support and/or justification to substantiate the findings of fact by the Board of Commissioners which was adopted by this Court in its Opinion.

7. That the sections that this Court found the respondent to have violated, or the sections which Bar Counsel points out to the Court that they should have found the respondent to have violated, are on their face void for vagueness.

8. That the sections that this Court found the respondent to have violated, or the sections which Bar Counsel points out to the Court that they should have found the respondent to have violated, are void as applied to the respondent for vagueness.

WHEREFORE, respondent, by counsel, respectfully moves that the Court reconsider its Opinion that was noted as filed on July 22, 1981.

Harry Donovan Lowe
By Counsel

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Frederick D. Fahrenz

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Of Counsel

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, 1981 TERM
City of Columbus.

Ohio State Bar Association,

Relator,

TO WIT: AUGUST 26, 1981

vs.

No. DD81-1
REHEARING

Harry Donovan Lowe,
Respondent.

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No._____Page_____
IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 26th day of August 1981.
THOMAS L. STARTZMAN *Clerk*
*By*_____*Deputy*

CERTIFICATE OF SERVICE

I, Stanley E. Preiser, attorney for Harry Donovan Lowe, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on November 24, 1981, I served three (3) copies of the foregoing Petition for Writ of Certiorari on the Ohio State Bar Association, respondent herein, by mailing three (3) copies in a duly addressed envelope, with first class postage prepaid to each of the following: John R. Welch, Esquire, 33 West Eleventh Avenue, Columbus, Ohio 43201; Albert L. Bell, Esquire, 33 West Eleventh Avenue, Columbus, Ohio 43201; William L. Clark, Esquire, 180 East Broad Street, Columbus, Ohio 43215; and Emerson Cheek III, Esquire, Suite 920, 17 South High Street, Columbus, Ohio 43215, Attorneys of record for respondent.

_____

Stanley E. Preiser

Office-Supreme Court, U.S.
FILED
DEC 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

HARRY DONOVAN LOWE,
Petitioner

v.

OHIO STATE BAR ASSOCIATION,
Respondent

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

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2. The Questions Presented for review here were first raised in the court below, in a general way, in petitioner's Motion for Rehearing. The questions were not briefed, and no citations of authority were presented to support petitioner's argument. The Motion for Rehearing was denied without opinion. Under such circumstances those questions are ordinarily not reviewable here. *Radio Station WOW, Inc.* v. *Johnson* 326 U.S. 120, 128 5

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STATEMENT OF THE CASE

This case concerns an order of the Ohio Supreme Court suspending petitioner from the practice of law for an indefinite period. (Application for reinstatement may be made two years from suspension date.) Under the provisions of the Ohio Constitution (Article IV, Section 2(A)(g)) the Supreme Court has original and exclusive jurisdiction in admission to the practice of law and discipline of persons so admitted.

Respondent commenced these proceedings by filing a complaint against petitioner with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. Gov. R. V of the Supreme Court's Rules for the Government of the Bar of Ohio provides that all proceedings in regards to complaints and grievances against lawyers shall be filed with and heard by the Board of Commissioners on Grievances and Discipline (hereinafter Board). The Board makes findings of facts and recommendations on discipline to the Supreme Court. In other words, the Board acts as a master commissioner or referee for the Supreme Court. 29 Ohio St. 2d xxix.

Petitioner's answer to the complaint generally and specifically denied the allegations against him.

A "pre-trial" hearing was held on June 29, 1979 before three members of the Board and, as a result, extensive stipulations were entered into by the counsel for petitioner, the petitioner himself and counsel for respondent. No federal question was raised at any of these proceedings.

Hearing on the complaint and answer was conducted by a three member panel of the Board on April 14, 15, 16, and 17, and June 16, and 17, 1980. Petitioner was present and represented by counsel. Thereafter, briefs in lieu of oral argument were filed by petitioner and respondent. In his reply brief in lieu of oral argument

before the Board, petitioner for the first time complained that the charges against him were "woefully lacking the requisite specificity which would satisfy the due process requirements of the Constitution of the State of Ohio and the Constitution of the United States."

On January 16, 1981 the Board filed its findings of fact and recommendation in the Supreme Court of Ohio, in which the Board found that petitioner had committed six violations of the Code of Professional Responsibility and recommended that three violations warranted a public reprimand and three warranted suspension from the practice of law for an indefinite period.

The Board did not rule on petitioner's contention that the charges against him lacked the requisite specificity to comport with due process of law.

On January 16, 1981, the Supreme Court issued its order to petitioner to show cause why the recommendation of the Board should not be confirmed and a disciplinary order entered.

Thereafter, petitioner filed his objections and supporting brief setting forth eight objections to the report of the Board. Pet. p. 54-55. The only federal question raised and briefed in the court below was petitioner's contention that DR 1-102 (A)(6) of the Code of Professional Responsibility is void for vagueness.

The case was then orally argued to the Court en banc.

Without passing on the federal question, the court below found the record evidence supported the Board's finding that petitioner's conduct violated DR 1-102 (A)(6), DR 1-102 (A)(3) and (4), DR 6-101 (A)(3), DR 7-102 (A)(3), and DR 9-102 (B)(1) and (3), of the Code of Professional Responsibility, and ordered petitioner suspended from the practice of law for an indefinite period.

Petitioner's motion for rehearing (Pet. p. 72-73) accused

the court below of failing to conduct an independent study of the record of the proceedings before the Board, the recommendations of the Board, and of delegating its responsibilities to the Board in violation of his procedural and substantive rights of due process of law. The motion for rehearing also contended that the seven disciplinary rules the court below found violated by petitioner are void for vagueness, and that the punishment of suspension from the practice of law under the record evidence of this case violates "the Eighth Amendment Cruel and Unusual Punishment Provisions and the Fourteenth Amendment." The motion for rehearing was denied without opinion.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Neither the decision below nor the record raises the Questions Presented in the petition. Therefore, this Court lacks jurisdiction to review those questions. Rule 21.1.(h).

The only federal claim raised and preserved in the court below was petitioner's contention that Disciplinary Rule 1-102 (A)(6) of the Ohio Supreme Court's Rules of Professional Responsibility[1] is void for vagueness, and its application to his conduct would deprive him of due process of law, etc. See Petitioner's Objections to Findings and Recommendations of the Board of Commissioners on Grievances and Discipline. Pet. p. 54-55. The Ohio Supreme Court did not decide that claim nor was such a ruling necessary to its decision. The court's order of suspension was based upon a finding of some six violations of the court's rules of professional responsibility. DR 1-102 (A)(6) was only one of the rules the court found was violated by petitioner. Pet. p. 65-69. Also violated were DR 1-102 (A)(3), illegal conduct involving moral turpitude; DR 1-102 (A)(4), conduct involving dishonesty, fraud, deceit or misrepresentation; DR 6-101 (A)(3), neglect of a legal matter entrusted to him; DR 7-102 (A)(3), concealing or knowingly failing to disclose that which he is required to reveal; DR 9-102 (B)(1), failing to promptly notify a client of the receipt of his funds, securities or other property; and DR 9-102 (B)(3), failing to maintain complete records of all funds etc. of a client coming into the possession of a lawyer and to render appropriate accounts

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[1] DR 1-1-2(A)(6) reads, "A lawyer shall not: Engage in any other conduct that adversely reflects on his fitness to practice law."

to his client regarding them. No federal claim was properly presented nor decided by the court below concerning the application of those disciplinary rules to petitioner's conduct. All that was claimed in the court below was that the evidence did not support a finding of violation of those rules. Petitioner's Objections to Findings of Board of Commissioners on Grievances and Discipline. Pet. p. 54-55.

Thus, without regard to the federal claim, the judgment and order of the Ohio Supreme Court rests on adequate and independent state grounds.

2. The Questions Presented for review here were first raised in the court below, in a general way, in petitioner's Motion for Rehearing. Pet. p. 72-73. The questions were not briefed, and no citations of authority were presented to support petitioner's argument. The Motion for Rehearing was denied without opinion. Pet. p. 75.

Under such circumstances those questions are ordinarily not reviewable here.

> "Questions first presented to the highest State court on a petition for rehearing, came too late for consideration here, unless the State court exerted its jurisdiction in such a way that the case could have been brought here had the question been raised prior to the original disposition." (Citation omitted.) *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 128.

It is true that petitioner's brief in lieu of oral argument filed with the Board raised a question of lack of specificity in the charges against him. (Pet. p. 4) The question was not supported by citation, brief or argument, and it was not passed upon by the Board in its report of its Findings of Fact and Recommendation filed in the Ohio Supreme Court. Pet. p. 35-51.

Petitioner filed eight separate objections to that report in the court below, but not one of those objections raised the question of lack of specificity of the charges. Of course, the court below did not pass upon that question.

Therefore, this court lacks jurisdiction to review that question. Rule 21. 1. (h).

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that three copies of the foregoing brief have been mailed by first class mail with postage prepaid to Counsel for Petitioner, Stanley E. Preiser, Preiser and Wilson Legal Corporation, Post Office Box 2506, Charleston, West Virginia, 25329. December 23, 1981.

Respectfully submitted,

John R. Welch